FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 721.

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR SOUTHERN COAL PRODUCERS ASSOCIATION AMICUS CURIAE.

EDWARD R. BURKE,
515 Southern Building,
Washington 5, D. C.

JOHN C. GALL,
701 Southern Building,
Washington 5, D. C.

Counsel for Southern Coal Producers Association.

BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
STATEMENT OF THE CASE	1
THE ESSENTIAL FACTS	4
PROPOSITIONS OF LAW	8
It is the Function of the Courts to Apply the Statute to the Facts of Any Particular Case	8
The Court will Examine All Relevant Aids to Construction in Applying Section 7 to Effectuate the Intention and Purpose of Congress	9
The Legislative History of the Fair Labor Standards Act is a Relevant Aid to the Construction of Section 7 of the Statute	13
The Contemporaneous Construction of the Statute by the Government Agency Charged with Enforcing it is Entitled to Great Weight in a Judicial Application of the Act	14
Custom and Usage is a Relevant Aid to the Court in Construing Section 7 of the Fair Labor Standards Act	16
AIDS TO STATUTORY CONSTRUCTION	18
Legislative Background of Federal Fair Labor Standards Act	18
Custom and Usage	29
Contemporaneous Construction	33
ARGUMENT	38

INDEX TO CITATIONS.

CASES:

A. B. Kirschbaum v. Walling, 316 U. S. 517 ..... 8, 11, 39
Apex Hosiery Company v. Leader, 310 U. S. 469 12
Armour & Company v. Wantock, 89 L. Ed. 120 ..... 8, 39
Appalachian Coals v. United States, 288 U. S. 344 .. 56

Page

Brewster v. Gage, 280 U. S. 327 14
Church of the Holy Trinity v. United States, 143 U. S. 457 13
Fawcus Machine Company v. United States, 282 U. S. 375 14
Foster v. United States, 303 U. S. 118 9
Gully v. First National Bank, 299 U. S. 109 15
Helvering v. Griffiths, 318 U. S. 371 17
Michaelson, et al. v. United States, 266 U. S. 42 13
Northwestern Mut. Life Ins. Co. v. Gridley, 100 U. U. 614 10
Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 ..... 13, 14, 46
O'Hara, et al. v. Luckenbach S. S. Co., 269 U. S. 364. 13
Overnight Motor Transportation Co. v. Missel, 316 U. S. 572 8
Ozawa v. United States, 260 U. S. 178 9
Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177 ..... 12, 13
Robertson v. Downing, 127 U. S. 607 17
Skidmore v. Swift & Company, 89 L. Ed. 125 ..... 8, 16, 17, 18, 39, 52
Slidell v. Grandjean, 111 U. S. 412 17
Stafford, et al. v. Wallace, etc., 258 U. S. 495 13
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 56
Tennessee Coal, Iron & R. R. Co. v. Muscoda; Local No. 123, etc., 88 L. Ed. 610; 137 F. 2d 176, 135 F. 2d 320, 40 F. Supp. 4 ..... 4, 17, 38, 40, 41, 42, 43, 48
Towne v. Eisner, 245 U. S. 418 16
United States v. American Trucking Associations, Inc., 310 U. S. 534 ..... 9, 11
United States v. City and County of San Francisco, 310 U. S. 16 13
United States v. Darby Lumber Co., 312 U. S. 100 13
United States v. Dickerson, 310 U. S. 554 ..... 10, 13
United States v. Fisher, 2 Cranch. (U. S.) 358 11
United States v. Hill, 120 U. S. 169 17
United States v. Isham, 17 Wall. 496 16
United States v. Midwest Oil Co., 236 U. S. 459 16
United States v. Shreveport Grain Elevator Co., 287 U. S. 77 14

Page

Walling v. A. H. Belo Corp., 316 U. S. 624 ..... 8, 15, 39
Walling v. Jacksonville Paper Co., 317 U. S. 564 ... 39

STATUTES:

Fair Labor Standards Act of 1938, June 25, 1938, 52 Stat. 1060; 29 U. S. C. A. §201, et seq.
Section 2 8
Section 7 9
Section 7(b)(1) and (2) 49

National Labor Relations Act, July 5, 1935, 49 Stat. 449; 29 U. S. C. A., §151, et seq.
Section 9 49

National Industrial Recovery Act, June 16, 1933, 48 Stat. 195
Section 7(a) 22, 46

United States Code Annotated
Title 30, Section 187 ..... 19, 46
Title 30, Section 189 19

CONGRESSIONAL RECORD:

Vol. 81, p. 7650 26
Vol. 82, p. 1391 26
Vol. 82, p. 1395 27
Vol. 83, p. 9 28
Vol. 83, p. 7283 27
Vol. 83, p. 7290 27
Vol. 83, p. 7291 27
Vol. 83, p. 7310 27
Vol. 83, p. 7322 28

MISCELLANEOUS:

Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30, 1943 19
Code of Federal Regulations, Title 43, Part 193 19
First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor 22
General Land Office, Circular No. 679 19

Page

Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937
Page 280 25
Page 281 25
Page 297 25
Senate Report No. 884, 75th Congress 26
Statutes and Statutory Construction, by J. G. Sutherland, 3d Edition
Vol. 2, Section 4502 16
Vol. 2, Section 4505 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 721.

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR SOUTHERN COAL PRODUCERS ASSOCIATION AMICUS CURIAE.

I. STATEMENT OF THE CASE.

This case is before the Court on writ of certiorari directed to the United States Circuit Court of Appeals, Fourth Circuit. That Court, in *Local No. 6167, United Mine Workers of America, etc. et al v. Jewell Ridge Coal Corporation*, held that underground travel time of bituminous coal miners from the portal of the mines to the usual working places and return to the portal constitutes time worked within the meaning of the Fair Labor Standards Act of

1938, and must be included within their work week for purposes of Section 7 of the statute.

In so ruling, the Circuit Court of Appeals reversed the decision of the United States District Court, District of Virginia, in *Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, etc. et al*, which had ruled:

> "(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return.
>
> "(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938."

The decision of the Circuit Court of Appeals appears in 145 F. 2d, 10, and that of the District Court in 53 F. Supp. 935.

The Southern Coal Producers Association participated in the hearings before both the lower courts as *amicus curiae*, and files this brief because of the importance of the case to the bituminous coal mining industry.

We can best summarize the vital character of the question here before the Court by quoting the language employed by the National War Labor Board when the 1943 wage controversy between the United Mine Workers and the bituminous coal operators was presented to that agency. The Board then said:

"... the whole economic structure of the bituminous mining industry has been built upon the payment of wages on the 'face to face' basis. To now reconstruct the maximum hours and working time provisions applicable to bituminous coal mining, so as to cure the inequities due to different individual travel time, would create utter confusion in the economics and in the wage structure of the industry, which could only adjust itself to this new system over a period of years. The considerations involved in such a change, both economically and with reference to the fair treatment of the individual workers, are so complex that they could be satisfactorily worked out only by a long period of collective bargaining, if at all."

(R. 741)

The Southern Coal Producers Association is of the opinion that the Fair Labor Standards Act does not compel the abolition of the face-to-face method of computing work time, established many years prior to the enactment of that law in order to cope with operating difficulties inherent in the nature of coal mining. The Association believes that nothing in the language of the statute or the intention and purposes of the Congress in enacting it impose a mandate that the bituminous coal mining industry shall include travel time in computing hours of labor for employees entitled to the benefits of Section 7 of the Fair Labor Standards Act. On the contrary, the Association believes that the statute leaves the solution of the travel time question for the processes of collective bargaining between the parties, where it can be solved in a manner best suited to the conditions prevailing in bituminous coal mining.

Therefore, with the consent of the parties to this case, the Southern Coal Producers Association appears before this Court, as *amicus curiae*, to urge the Court to uphold the decision of the District Court.

For the convenience of the Court this brief refers to the Jewell Ridge Coal Corporation as the "Petitioner"; to the United Mine Workers of America as the "Union"; to the

Administrator of the Wage and Hour Division of the United States Department of Labor as the "Administrator"; and to the case of *Tennessee Coal, Iron and Railroad Company, Muscoda Local No. 123, etc.*, 64 Sup. Ct. 698, 88 L. ed. 610; 137 F. 2d 176; 135 F. 2d 320; 40 F. Supp. 4, as the "Muscoda Case."

II. THE ESSENTIAL FACTS.

The pertinent facts established by the evidence and testimony and found by the District Court are as follows:

Bituminous coal is found in seams underground. Main tunnels, which are known as "haulage ways", are bored to give access to such coal. From the haulage ways, laterals, which are called "cross entries", are driven to give access to and from the boundaries of the "rooms" from which coal is taken. 53 F. Supp. 935, 937; (R. 544.)

Electric railways are operated for the removal of mined coal, and they are used also to transport employees to and from their places of work in the mines.

Employees generally fall into two categories. Those who operate and maintain the railways and electric power systems and maintain safety within the mines are known as "company men," and are paid at hourly rates. Included within this category are motormen, brakemen, trackmen, bratticemen, wiremen, and bondmen. 53 F. Supp. 935, 958; (R. 544.) The employees who actually mine the coal from the seams are known as "machinemen" and "coal loaders." The coal loaders, and usually the machinemen, are paid on a piecework basis, which is an agreed rate per ton of coal. However, their hours of labor are important because they are paid rate-and-a-half rate for all coal mined by them after the expiration of seven hours' labor. 53 F. Supp. 935, 938; (R. 545.)

All employees are required to report at their usual working places at a specified time. They come from their homes to the mines in various ways, arriving in time to board the "man trips" which convey the employee to, or near, his place of work. "Man trips" are trips made by trains of

mine cars for that purpose. 53 F. Supp. 935, 938; (R. 545.) Employees carry with them lamps and drinking water. However, before embarking on the man trips, some few employees do various things which occupy them from three to ten minutes.

> "Coal loaders, the most numerous class, do nothing, unless they have brought tools out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain their repaired tools. The bondman, wiremen, bratticemen, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of operation in the mine. Motormen and brakemen go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work."
>
> 53 F. Supp. 935, 938 (R. 546.)

Employees who enter the mines at places other than the main portal "catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foreman." 53 F. Supp., 935, 939; (R. 546.)

No work or labor is required of employees while they are riding the man trips, and supervision is limited to the

enforcement of safety rules and regulations. Occasionally foremen may give working instructions to employees during the man trips, but, as the trial court found,

> "Such instances are rare, as instructions are ordinarily and customarily given at the working place." 53 F. Supp. 935, 939 (R. 547.)

Riding on man trips is neither painful nor unduly uncomfortable. 53 F. Supp. 935, 939 (R. 547.) And as distinguished from the underground travel in iron ore mines, which the Trial Court found to be replete with hazards, the Trial Court has found in bituminous coal mines.

> "... No such painful and burdensome conditions as those described in the iron ore mines." 53 F. Supp. 935, 949 (R. 567).

The face-to-face method of computing work time in bituminous coal mines is a traditional one, which has been accepted throughout the industry for fifty years. 53 F. Supp. 935, 939 (R. 548.) It has been the standard provision for measuring work time, and has been repeatedly incorporated in basic wage agreements made between the bituminous coal mine operators and the union during that period. 53 F. Supp. 935, 940 (R. 550). Those agreements, which have resulted from "collective bargaining in its complete sense" with one of the most powerful labor organizations in America, have secured for bituminous coal miners uniform high rates of pay which contemplate the workday's beginning and ending at the usual working places. 53 F. Supp. 935, 940; (R. 550).

In its 1943 wage demands the union for the first time challenged the face-to-face method of computing work time. However, as the District Court found, the 1943 demand of the union actually was a demand for a flat wage increase to all miners, whether or not they travel underground, and, in reality, not a contention that the Fair Labor Standards Act requires the inclusion of travel time as time worked. 53 F. Supp. 935, 942; (R. 552.)

Following the enactment of the Fair Labor Standards Act, the bituminous coal operators joined the union in seeking from the Wage and Hour Administrator a construction which would not require payment for travel time under the statute (See Houck letter, R. 667). After an extended and comprehensive investigation, the Administrator ruled that the statute does not compel payment for travel time as such in the bituminous coal mining industry. 53 F. Supp. 935, 941; (R. 551.) That ruling remains unchanged, although, as the District Court pointed out, the Administrator was invited to appear in this case and had a representative present at the trial. 53 F. Supp. 935, 945, (R. 566.)

Such findings were accepted by the Circuit Court of Appeals, which said:

> "In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R. Co.* v. *Muscoda Local No.* 123, *etc.*, U.S. , 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar." 145 F. 2d 10, 11 (R. 889).

III. PROPOSITIONS OF LAW.

Proposition No. 1:

It is the function of the courts to apply the statute to the facts of any particular case.

The Fair Labor Standards Act of 1938 was enacted to alleviate

> "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers"

employed in

> "industries engaged in commerce or in the production of goods for commerce"

(29 U.S.C.A. Sec. 202(a))

Since it was designated for application to the whole gamut of industries and mercantile establishments which produce the goods which move in interstate channels or which effectuate such interstate movement, the Act, necessarily, was couched in general terms.

Because the Congress did not delegate to any administrative agency the task of finding facts and determining in the first instance whether particular cases fall within or without the statute, the Fair Labor Standards Act vests in the courts:

> "the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." *A. B. Kirschbaum* v. *Walling*, 316 U. S. 517, 522; *Jim Skidmore* v. *Swift & Company*, 89 L. Ed. 125, 127.

In making such application, the courts must assign meaning to those terms left undefined by the law. *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 631, 634; *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572, 579; *Armour & Company* v. *Wantock*, 89 L. Ed. 120, 123.

In the instant case, determination of the issue presented entails the assignment of a meaning to the term "work week" as used in Section 7 of the Fair Labor Standards Act. That section provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The statute does not define the term "work week," thus imposing upon this Court the task of interpreting and construing it in this case. That interpretation and construction is the sole question of law presented in this case. Once a meaning is assigned to the term, the issue is whether the facts as found by the trial court require affirmance of its judgment that the underground travel time is not part of the work week or affirmance of the Circuit Court of Appeals' judgment that it is.

Proposition No. 2.

The court will examine all relevant aids to construction in applying section 7 to effectuate the intention and purpose of the Congress.

It is a fundamental canon of statutory construction that the legislative intention and purposes of the law must be effectuated: *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534; *Foster* v. *United States*, 303 U. S. 118. So basic is the rule, the Court has held that, if necessary, the literal meaning of words used in a statute must be sacrificed

> "that the purpose may not fail." *Ozawa* v. *United States*, 260 U. S. 178, 194.

And in *Northwestern Mut. L. Ins. Co.* v. *Gridley*, 100 U. S. 614, 615, the Court pointed out that

> "a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

Because the legislative intention must be effectuated, the courts may resort to extrinsic factors as an aid to the construction of general language which is susceptible of different meanings dependent upon the circumstances surrounding its use. Sutherland, in his work on "Statutes and Statutory Construction" points out that

> "It must be understood, of course, that a well-drafted statute will in most cases and certainly should, present the words used with sufficient precision and accuracy that additional inquiry by the court will be unnecessary. But as all future circumstances cannot be anticipated by even the most far-sighted legislator the function of judicial interpretation cannot be completely avoided. When such a circumstance arises, certainly the safest starting point for interpretation will be the statute itself. But it is by no means the safest stopping point. Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation." (Vol. 2, Section 4505)

This principle also is enunciated by the Court, in *United States* v. *Dickerson*, 310 U. S. 554, 561, in which the Court said:

> "The respondent contends that the words of §402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See

United States v. *Perry*, 50 F. 743, 748 (CCA 8th). The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co.* v. *United States*, supra (278 U. S. at 48, 73 L. ed. 177, 49 S. Ct. 52). The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

See, also, *United States* v. *Fisher*, 2 Cranch (US) 358, 386; *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543.

Resort to all relevant aids to construction is particularly necessary where the Court is called upon to apply general language used in remedial social legislation enacted to apply

> "to an infinite variety of complicated industrial situations". (*A. B. Kirschbaum* v. *Walling*, 316 U. S. 517, 523)

Faced with the necessity of determining whether certain labor union activities were included within the proscriptions of the Sherman Act, this Court said:

> "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce. The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute,

and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489)

Again, in *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 185, in which the issue involved was the application of Section 8(3) of the National Labor Relations Act, this Court spoke in the following language:

> "Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. We are asked to read 'hire' as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of §8(3) in that 'hire' would serve no function because, in the sense which is urged upon us, it is included in the prohibition against 'discrimination in regard to . . . any term or condition of employment.' Contemporaneous legislative history, and, above all, the background of industrial experience forbid such textual mutilation."

Proposition No. 3.

The legislative history of the Fair Labor Standards Act is a relevant aid to the construction of section 7 of the statute.

In determining Congressional intent, in order to give statutory language its proper scope and function, the Court will examine the history of the law. This examination may include a study of the events and circumstances which led to the presentation of the measure to the legislature and a scrutiny of the course of the legislation through the Congress.

Consideration of the events and circumstances which motivated the passage of the Fair Labor Standards Act is particularly important in construing its language; for an examination of the evils sought to be remedied provides a proper medium to guide the Court in ascertaining the scope and meaning of the law. *Stafford, et al* v. *Wallace, Secretary of Agriculture*, 258 U. S. 495; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Phelps Dodge Corporation* v. *National Labor Relations Board, supra.* As was said in the *Church of the Holy Trinity* case:

> "... and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Having examined such factors, the Court, in addition, will examine the course pursued by the statute in its passage through the legislature. This may include resorting to the testimony of the witnesses who appeared before the Congressional committees which conducted hearings; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *O'Hara, et al.* v. *Luckenbach S.S. Co.*, 269 U. S. 364; to the reports of the Congressional committees to which the measure was referred; *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *Michaelson, et al.* v. *United States, etc.*, 266 U. S. 42; and to the debates in Congress, *United States* v. *City and County of San Francisco*, 310 U. S. 16; *United States* v. *Dickerson, supra.*

Proposition No. 4.

The contemporaneous construction of the statute by the government agency charged with enforcing it is entitled to great weight in a judicial application of the act.

The interpretation of a statute made by the agency entrusted with the duty of administering and enforcing it also is relevant for the Court to consider in determining its meaning; and where such agency has adhered to a practical interpretation for a substantial period of time

> "such construction in cases of doubtful meaning is accepted unless there are cogent and persuasive reasons for rejecting it." *United States* v. *Shreveport Grain & Elevator Company*, 287 U. S. 77; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *Brewster* v. *Gage*, 280 U. S. 327; *Norwegian Nitrogen Products Company* v. *United States, supra.*

Furthermore, as the Court said in the *Norwegian Nitrogen Products Company* case,

> "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (Page 315)

In this case, the persuasiveness of administrative interpretation is enhanced. The Congress failed to define the meaning of work time under Section 7 of the Fair Labor Standards Act because

> "The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda*, Local No. 123, Circuit Court of Appeals, Fifth Circuit, 137 F. 2d 176, 181.

The task confronting this Court is to make a practical application of the term "work week" which is consonant with the purposes of the Fair Labor Standards Act. This Court has recognized that it cannot, and is not called upon to, and should not, pronounce an inflexible definition of working time which would be applicable to any and all circumstances, thus reducing the decision in any case which involves a query whether particular time is time worked to an application of that definition to the particular facts. *Armour & Company* v. *Wantock*, 89 L. ed. 120, 125. In that case, discussing the definition of "work" utilized in the Muscoda case, the Court said:

> "To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the Tennessee Coal, Iron & R. Co. Case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts."

Rather, it has dealt with such questions as problems in which

> "what is needed is something of that common sense accommodation of judgement to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First National Bank*, 299 U. S. 109, 117.

The language of the Court in *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 634, summarizes the attitude of the Court toward the question here:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships

to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do."

Because of this recognition of the empirical nature of the investigation which must be made to apply Section 7 of the Fair Labor Standards Act to any existing set of facts, the Court has held that the interpretations of the Wage Hour Administrator

> "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 89 L. ed. 125, 129.

Proposition No. 5.

Custom and usage is a relevant aid to the court in construing section 7 of the Fair Labor Standards Act.

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425.

> "It is only as custom and usage and agreement attach a particular meaning to a particular word that it has any significance in relation to either a tangible or an intangible object." *Statutes and Statutory Construction*, J. G. Sutherland, Vol. 2, Sec. 4502.

The truism contained in the above quotations explains why, in construing a statue, the courts examine the custom and usages prevailing in the fields in which the statute is intended to apply. *United States* v. *Isham*, 17 Wall. 496; *United States* v. *Midwest Oil Company*, 236 U. S. 459;

Slidell v. *Grandjean*, 111 U. S. 412; *Skidmore* v. *Swift & Co.*; 89 L. ed. 125.

In the *Skidmore* case this Court was applying Section 7 of the Fair Labor Standards Act in connection with waiting time. Discussing the relevancy of the Wage-Hour Administrator's interpretations, the Court said:

> "Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."

In the *Musçoda* case, *supra*, the Fifth Circuit Court of Appeals recognized the importance of custom and usage in connection with the very problem here presented, saying

> "The Act does not define 'work time' or even 'work.' It may apply to each and every industry. What would be work in one industry may not be in another." 135 F. 2d 320, 323.

And in this particular case it is relevant for the Court to notice that custom and usage in the bituminous coal industry, as formalized in a long series of collective bargaining agreements, created the concept of working time which was adopted by the Wage-Hour Administrator.

Where the persons affected by a statute have pursued a uniform course of conduct for a long time and that course accords with the construction of the law made by the government agency charged with its enforcement, the construction of the act thus adopted merits serious consideration by the Court. *Helvering* v. *Griffiths*, 318 U. S. 371; *United States* v. *Hill*, 120 U. S. 169; *Robertson* v. *Downing*, 127 U. S. 607.

In regard to the Fair Labor Standards Act, this Court has declared the very sound doctrine that

> "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights

shall be at variance only where justified by very good reasons." *Skidmore* v. *Swift & Co., supra,* 128.

Where, as here, the custom and usage in the bituminous coal industry created a concept of work time which was well established prior to the enactment of the Fair Labor Standards Act and that concept was accepted by the Wage-Hour Administrator in the "public enforcement" of the law, the value of that custom and usage in "good judicial administration" is undeniable.

IV. AIDS TO STATUTORY CONSTRUCTION.

A. Legislative background of Federal Fair Labor Standards Act.

In considering the legislative history of the Federal Fair Labor Standards Act, it is relevant to consider events leading up to adoption of the act insofar as they have any bearing on the intention of Congress. When it is considered that the contention is now being made that Congress intended to change a long-established practice in the bituminous coal mining industry, developed through collective bargaining, it becomes extremely relevant to consider whether the Congress was cognizant of the practices and was apprised of any desire on the part of either of the parties to the collective bargaining agreements for a change brought about through legislation.

It is a matter of public record that labor problems within the bituminous coal mining industry had been brought to the attention of the Congress almost continuously for a period of at least fifteen years prior to the adoption of the Federal Fair Labor Standards Act and that at the time of the adoption of this act the Congress was acutely conscious of the status of labor relations in the bituminous coal mining industry.

During the years following the First World War, many measures which dealt with the bituminous coal mining in-

dustry were introduced in Congress. Hearings were held before the committees of Congress; representatives of the operators and of the United Mine Workers appeared before Congressional committees. None of these measures resulted in general legislation prior to 1933. However, in 1920, when the Congress enacted the statute for the leasing of lands in the public domain for the conduct of mining operations, it included a provision that all leases made pursuant to the statute should include

> "a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency" *Feb. 25, 1920, C. 85, §30, 41 Stat. 449; 30 U. S. C. A. §187.*

The Secretary of the Interior was

> "authorized to prescribe necessary and proper rates and regulations and to do any and all things necessary to carry out and accomplish the purposes"

of that mandate *(Feb. 25, 1920, C. 85 §32, 41 Stat. 450; 30 U. S. C. A. §189)*. Pursuant to that authority, "Regulations concerning Coal Mining Leases, Permits and Licenses" were approved April 1, 1920, containing a standard form of lease to be used. That lease provided that the lessee,

> "shall not require or permit miners or other employees, except in case of emergency, to work more than eight hours in any one workday. . . ." *(General Land Office, Circular No. 679, P. 14)*

That provision has remained in the standard form lease used under the Act of February 25, 1920, and now appears in the "Regulations Applicable to Coal Permits, Leases, and Licenses, Exclusive of Alaska" issued by the Secretary of the Interior. *(Code of Federal Regulations*, Part 193, Title 43.)

Under the 1920 Act, hundreds of leases of coal lands have been made, and the "Annual Report of the Secretary of the

Interior for the Fiscal Year Ended June 30, 1943" mentions three-hundred and sixty-three coal land leases outstanding as of that date. (Page 173).

It is significant to note that since the passage of the 1920 leasing statute there have been no recorded regulations or interpretations by the Secretary of the Interior requiring the inclusion of underground travel time in the workday in coal mines operated under statutory leases, although, during this time, the practice of excluding such travel time from the workday has prevailed in all bituminous coal mines in the United States.

And it is worthy of note that in the month following the passage of the 1920 law, Mr. Lewis, President of the United Mine Workers, at the request of the President of the United States, signed a wage agreement incorporating the report of the Bituminous Coal Commission appointed by the President which defined the workday as

> "eight hours work in the mines at the usual working places".

Therefore, for more than eighteen years prior to the enactment of the Fair Labor Standards Act, there existed a public law fixing a maximum "workday" of eight hours for certain coal miners. Not once during that time did the Government agency charged with enforcing it construe it as revoking the face-to-face method of computing work time; nor did the United Mine Workers contend that it required any deviation from or exception to the existing practice of incorporating the face-to-face method in wage agreements made with the coal operators. The Houck letter, dated July 9, 1940, states

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense." (R. 669)

In 1933 Congress enacted the National Industrial Recovery Act, which provided for the promulgation of "codes of fair competition" which were to have the force and effect of law. In September, 1933, such a code was approved by the President of the United States for the bituminous coal mining industry. The operators and representatives of the United Mine Workers agreed upon this code. In the hearings which led up to the adoption of the code no demand was made by the representatives of the miners for any change in the face-to-face method of computing pay; no point was raised to the effect that travel time was work time or that it should be compensated as such. The code adopted in 1933 provided for an eight-hour day at the face of the mine or at the usual working place. In 1934 this was amended to provide for a seven-hour day. This code was interpreted so that there was no violation of the code because of travel time after eight hours under the original code or seven hours under the amended code.

In 1935 the first Bituminous Coal Act was passed by Congress. It dealt specifically with wages, hours, and collective bargaining in bituminious coal mining. It said nothing about changing the face-to-face method of computing pay. It made no provision for pay for travel time as such. What is of far greater significance, no contention was made by the United Mine Workers in the hearings held prior to the adoption of the Bituminous Coal Act that such travel time should be compensated as work time.

In 1937 the second Bituminious Coal Act was passed. The hearings preceding passage of that Act disclose no mention of travel time and no demands on the part of the United Mine Workers that travel time should be compensated as such or that it should be taken into account in connection with the determination of the costs of producing coal or that there should be any change in the established face-to-face method of computing the pay of employees.

Thus, we find that through a period of many years prior to the passage of the Federal Fair Labor Standards Act

in 1938, Congressional committees had conducted investigations into the bituminous coal mining industry; had held hearings on proposed legislation; had made reports to the Congress; that the Congress had enacted legislation dealing with the bituminous coal mining industry; and that at no time was there any claim advanced that travel time should be treated as work time or compensated as such by statutory provision. The fact that Congress was acutely aware of labor and competitive conditions in the bituminous coal mining industry during all these years, that no assertion was made with respect to travel time, that no demand was made for legislative remedy, and that no specific legislative provision dealt with compensation for travel time as such, presents compelling evidence, both that there was no attempt on the part of the United Mine Workers to secure legislative remedy and that the Congress did not intend to provide a legislative remedy for an alleged evil now but never before asserted, and which during all those years was not alleged by the union or recognized by the Executive branch or the Congress.

The first general federal regulation of wage and hour standards for private employment was contained in Sec. 7 (a) of the National Industrial Recovery Act, which provided that every code of fair competition was to contain the condition that employers comply with the maximum hours, minimum pay rates, and other conditions of employment approved or prescribed by the President. As the Administrator of the Wage and Hour Division has pointed out, that was

> "undoubtedly the most important antecedent of the Fair Labor Standards Act" *(First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, for the calendar year 1939, P. 3).*

The "Code of Fair Competition for the Bituminous Coal Industry" under the National Industrial Recovery Act was issued in September, 1933, following a conference in which

representatives of the bituminous coal operators and the United Mine Workers participated. At the hearings John L. Lewis stressed the desirability of arriving at provisions covering wages and hours through the process of collective bargaining. He said:

> "It has been our interpretation of the National Recovery Act from its earliest stages . . . that the real purposes of the law would be best attained by collective agreements between representatives of organizations of employees and representatives of employers who had associated themselves together for the purpose of formulating a code of fair competition for an industry. In other words, provisions as to wages and working conditions for a proposed code could not be submitted by employers or become the subject of investigation and determination by the Recovery Administration, until every opportunity had been given to employers and employees to meet and agree upon maximum hours of labor, minimum rates, and other necessary conditions of employment." (Hearings on a Code for the Bituminous Coal Mining Industry, before the National Recovery Administration, Washington, August 9, 1933).

The code for the bituminous coal industry, resulting from these hearings, contained the following provision regarding hours of labor:

> "No employee except members of the executive, supervisory, technical and confidential personnel, shall be employed in excess of 40 hours in any calendar week after the effective date of this Code. No employee shall be required or permitted to work more than *eight hours in any one day at the usual working places* or otherwise in or about the mine (exclusive of lunch period) whether paid by the hour or on a tonnage or other piece work basis." (Code of Fair Competition for the Bituminous Coal Industry, approved September 18, 1933, Article III; italics supplied).

In March, 1934, Article III was amended to provide:

> "No employee, except members of the executive, supervisory, technical and confidential personnel shall be

employed in excess of seven hours per day and five days per week, subject to the exceptions hereinafter stated.

"*Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places* for all classes of labor, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piecework basis; except in cases of accident which tem-temporarily necessitate longer hours for those required on account thereof; and also excepting that number of workers in each mine whose daily work includes the handling of mantrips and those required to remain on duty while men are entering and leaving the mine." (Italics supplied).

The code remained in effect until 1935, when the National Industrial Recovery Act was declared unconstitutional by the United States Supreme Court. And it will be noted that the provision concerning hours of work was that which for many years had been contractually agreed upon between the bituminous coal operators and the United Mine Workers, thus lending Government approval to the provision.

In May, 1937, Representative Connery introduced a bill designated H.R. 7200, entitled "Bill for the Establishment of Fair Labor Standards in Employment In and Affecting Commerce, and For Other Purposes." And on the same day, Senator Black introduced S. 2475, bearing the same title. The bills, which differed but slightly, were referred respectively to the House Committee on Labor and to the Senate Committee on Education and Labor. From June 2, 1937, to June 22, 1937, these committees held joint hearings, the proceedings of which have been published in three volumes. John L. Lewis testified at length, but nowhere indicated that travel time should be included as time worked in the workday or workweek. On the contrary, he indicated that he did not anticipate that the bill would affect the coal industry. The following excerpts from the hearings are in point:

"SENATOR LAFOLLETTE. * * * As I understand it, the objective of this bill as outlined in section 23,

one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization.'" (Page 280).

"MR. LEWIS. * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281).

SENATOR HOLT. Would you favor allowing the board to investigate collective bargaining agreements where the collective bargaining agreement was beyond the wage level?

"MR. LEWIS. No; I see no point in it.

"SENATOR HOLT. If they have a right to investigate collective bargaining agreements below the wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"MR. LEWIS. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards." (Page 297).

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

On July 6, 1937, the Senate Committee favorably reported an amended bill in the nature of a substitute, stating:

> "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong.)

The measure was debated in the House and Senate from time to time beginning in the Senate on July 27, 1937, and various amendments were discussed. Although the debates do not touch upon the meaning of work day, work week, or hours of work, they do contain various expressions which show an intention not to interfere with the process of collective bargaining. The following excerpts from the Congressional Record are in point:

> "MR. WALSH. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?
>
> "MR. BLACK. It does not." (Senate, July 27, 1937. Congressional Record, Vol. 81, P. 7650.)
>
> "MRS. NORTON. * * * It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of the workers * * *" (House, December 13, 1937, Congressional Record, Vol. 82, P. 1391.)
>
> "MR. RANDOLPH. * * * It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized * * *" (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395; parenthesis supplied.)

"MR. CURLEY. * * * There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7283.)

"MR. BOILEAU: "What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7290.)

"MR. ALLEN. * * * This bill has a threefold purpose as I see it. First, it eliminates sweat shops— * * * The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7291.)

"MR. FITZGERALD. * * * I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and, therefore, not with respect to the bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

Although no statute was enacted during 1937, in the third session of the 75th Congress, on January 3, 1938, the Presi-

dent again recommended legislation governing hours and wages. In his message, he said:

> "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, P. 9.)

Pursuant to that request measures were again presented to the House, and the Fair Labor Standards Act of 1938 was passed, and approved by the President on June 25, 1938.

Shortly before its passage, Congressman Connery again summarized its objective, stating:

> "The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatshop conditions and child labor. Those are the two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, P. 7322.)

The statute states as its objective ". . . to correct and as rapidly as practicable to eliminate" . . . those . . . "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . ." (Title 29, U. S. C. A., Sec. 202). In that language the law expressly states that its objective is that sought by the President in his message of January 3, 1938—namely, to eliminate wages which will not provide workers the means of maintaining a minimum standard of living and to prevent intolerable hours of work detrimental to the health and well-being of the workers. Nowhere in the statute or in the Congressional proceedings prior to its enactment is there any expression of intention to compel an increase of earnings or a reduction of hours where not deemed essential to achieve these objectives.

B. Custom and Usage.

Universally, the custom and usage in the bituminous coal industry has been to exclude travel time from the scope of hours worked. It has been recognized by both the coal operators and their employees that any other system would economically demoralize the industry and inflict mutual hardship upon them. (Houck letter, R. 670)

Necessary variation in the amount of time spent in going between the portal and the face, or other usual working place of the miner, has dictated the established policy of excluding travel time from hours worked. Because this travel time varies from mine to mine and changes constantly in any one mine, it was apparent to employers and employees that the inclusion of travel time as work time would disrupt wage scales and normal competition.

In bituminous coal mines travel time ranges from nothing to three hours per day, and labor cost constitutes about two-thirds of the total mine cost of producing bituminous coal. It is apparent, therefore, that should travel hours be declared hours of work under Sec. 7 of the Fair Labor Standards Act, the payment of uniform wage rates throughout the industry would be competitively impossible. And, John L. Lewis himself has said,

> "The United Mine Workers of America, in supplying a uniform, competitive labor cost for bituminous coal mining, has been the only stabilizing force which the industry ever had." (August 9, 1933, hearings before National Recovery Administration)

It has been a mutual recognition of the essentiality of avoiding the disruption which would attend the inclusion of travel time as time worked which has been a compelling factor in the drafting of collective-bargaining agreements between the coal operators and the United Mine Workers. For over fifty years their contracts have defined working time as time spent at the face of the mine, or at the miners'

usual working place, and have excluded travel time. (Houck letter, R. 669)

Although they have negotiated many master agreements and hundreds of local agreements, and numerous significant changes have been made in the contracts, the contracts have all excluded travel time from hours worked.

Apparently the Circuit Court of Appeals was convinced that the face-to-face method of computing worktime has been abrogated by voluntary agreement of the parties. It states in its opinion that

> "The disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system of computing the work week has now been adopted in the industry." 145 F. 2d 10, 13, (R. 893)

The agreement referred to is that commonly designated as the "Ickes-Lewis Agreement," and a brief reference to the circumstances attending its execution conclusively demonstrates that in no true sense does it represent a voluntary shift from the face-to-face method to the portal-to-portal method. In the March, 1943, collective-bargaining negotiations, the United Mine Workers, under the heading "Hours of Labor" demanded:

> "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers", 53 F. Supp. 935, 941 (R. 552)

The succeeding demand, under the heading "Wage Rate Increases" sought a flat wage increase of two dollars per day

"for all classifications of inside and outside day men" with equivalent raises for pieceworkers, and provided

> "The increased rates include compensation to meet the portal to portal starting and quitting time."

The District Court properly found that the union's demand was

> "actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground." 53 F. Supp. 935, 942 (R. 552).

The coal mine operators and the union were unable to negotiate an agreement and the dispute was certified to the National War Labor Board on April 22, 1943 (Ex. 33, R. 302, 711). Work stoppages occurred; and on May 1, 1943, the Government seized the mines, placing the Secretary of the Interior in charge of operating them. The events which occurred between the commencement of negotiations in March, 1943, and the execution of the "Ickes-Lewis Agreement" in November, 1943, are set forth in detail in Petitioner's brief, at Pages 38 to 47, and need not be repeated here. It will suffice here to mention several important facts:

1. Throughout the protracted dispute, the union repeatedly endeavored to secure a general wage increase to all employees represented by it, using the so-called "portal-to-portal" demand merely as a device to circumvent wage stabilization rules prohibiting the increase. The National War Labor Board decision of June 17, 1943, emphasizes this:

> "The mine workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amounted on an average to an hour and one-half a day . . . The United Mine Workers proposed to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers . . . The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage stabilization policies' contrary to the Board's directive order of May 25, 1943." (R. 743)

2. The "Ickes-Lewis Agreement" does not contain compensation for actual travel time, nor does it include actual travel time within the workweek. The agreement, which is a modification of the Second Illinois Supplemental Agreement, provides a method of wage calculation which assumes that each employee has forty-five minutes of travel-time (R. 835). That the assumption does not include compensation for actual travel time is made clear by the fact that in Petitioner's two mines, for example, average daily travel time is 88 minutes and 67.1 minutes, respectively. (R. 238, 239).

In no sense, therefore, does the agreement provide that individual mine employees shall receive compensation for actual travel time, or that such actual travel time should be included within the work week.

3. Insofar as the Ickes-Lewis Agreement represents a deviation from the face-to-face method of computing worktime in the bituminous coal mines, it can in no sense be construed as a voluntary acceptance by the bituminous coal operators of the portal-to-portal method. As previously indicated, the Ickes-Lewis Agreement does not provide for true portal-to-portal compensation; and it does not represent the uncoerced policy of the coal operators.

While in June, 1944, the Southern bituminous coal operators made an agreement with the United Mine Workers incorporating the Ickes-Lewis provisions, they made the agreement in order to secure release of their mines from Government possession. While the bituminous coal mines were still in Government possession, C. J. Potter, Deputy Coal Mines Administrator, issued a memorandum "To All Operating Managers for the United States for Bituminous Coal Mines" directing them to put the terms of the Ickes-Lewis Agreement "in effect as of November 3", 1943. To find, as the Circuit Court of Appeals did, that "by agreement between the miners and operators, the portal to portal system of computing the workweek has now been adopted

in the industry," is to ignore realities. A hybrid arrangement made between the Secretary of the Interior and the President of the United Mine Workers was imposed upon the industry to avert work stoppages in the coal fields. It was accepted by the operators as a temporary war measure for the period ending April 1, 1945, to secure the return of their properties and to maintain the production of urgently needed coal since it was made clear to them that the Government had determined to compromise the wage dispute with the United Mine Workers on that basis and that their properties would not be returned to them unless they accepted the Ickes-Lewis "Agreement".

C. Contemporaneous Construction.

Provision that the work day shall be the time spent at the face or at the employee's usual working place has been included in all agreements since the passage of the Fair Labor Standards Act of 1938, with the full acquiescence of the Wage and Hour Division, which is the Government agency charged with the duty of enforcing this law.

On July 9, 1940, Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, addressed a letter to Colonel Philip B. Fleming, Administrator, Wage and Hour Division, Department of Labor, in which he requested the division to "accept the standards of wages and hours of work, and the definition of working time as set forth in the Appalachian agreement (which embodies the customs and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'" In that letter, Mr. Houck urged as reasons for such acceptance the following:

> "The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appa-

lachian agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $0.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, 'Work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for at the rate of time and one-half * * *' It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

"There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, and working places move farther and farther away from the portal or opening of the mine, and as such condi-

tions develop it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as 'man trips.' These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

"In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

"It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically

all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payments by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible." (R. 667 et seq.)

On July 18, 1940, Colonel Fleming replied, and in part stated:

"The division does recognize, however, that some industries present peculiar hours worked problems and that such problems have been settled over a period of years to the satisfaction of both employers and employees through bona fide collective bargaining agreements. Such cases involve difficult hours worked questions which are not susceptible of categorical answer. Strong arguments are available to support more than one solution and, in practice, the problems have been adjusted by means of a long process of give and take. Although the particular adjustment may be subject to some doubt, in our opinion, however, the courts in deciding these problems will take into consideration and be largely influenced by the custom and practice

which has been set forth in collective bargaining agreements. Therefore, this division in carrying out its enforcement duties in the bituminous coal mining industry under the act will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances which you describe in your letter and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable." (R. 672, 673)

Following that acceptance of Mr. Houck's request, the Wage and Hour Division on July 27, 1940, issued a release in which it stated:

"Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry, the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in a particular industry and are supported by a long history of *bona fide* collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening." (R. 675)

Therefore, it is established beyond any reasonable doubt that the Wage and Hour Division in enforcing Section 7

of the Fair Labor Standards Act adopted as its own the definition of working time established by agreement between the coal operators and the United Mine Workers of America for more than half a century.

ARGUMENT.

The question which is presented in this case calls for a judicial application of Section 7 to underground workers in the bituminous coal mining industry.

The findings of fact show that for many years prior to the enactment of the Fair Labor Standards Act, by custom and usage and agreement, travel time in coal mines has been excluded from the work day of such employees. And until 1943, when in order to procure a general wage increase barred by emergency wage stabilization statutes and policies the United Mine Workers asserted a statutory right to payment for such travel time, the exclusion of such travel time from the work week had been advocated by the union. In 1940 the union and the operators jointly sought a ruling from the Wage and Hour Administrator to permit the exclusion of travel time from the work week under the Fair Labor Standards Act; and after a painstaking and thorough investigation, the Administrator ruled that the statute does not compel the inclusion of travel time in the work week.

However, the Circuit Court of Appeals in this case ruled that the Fair Labor Standards Act compels the inclusion of travel time in the work week—reversing the judgment of the Trial Court. The decision of the Circuit Court of Appeals is based squarely on the conclusion that this Court in the Muscoda case pronounced a legal definition of "work or employment" by which the applicability or non-applicability of Section 7 must be determined in any situation. Thus, the Circuit Court of Appeals reduced the question presented in this case to a simple problem of mensuration; and, while it accepted the findings of fact made by the Trial Court, it held extraneous those facts which the District

Court found distinguished the situation in the bituminous coal mining industry from the situation in the iron ore mining case.

The different judgments of the two courts, therefore, resulted from the Circuit Court's conviction that the decision of this Court in the Muscoda case enunciated a legal formula for the determination of what is, or is not, a part of the statutory work week, and the District Court's concept that no legal formula should be attempted but that each case should be examined and judged in the light of all the facts existing, including custom and usage, agreement between employer and employee, and administrative construction of the Fair Labor Standards Act by the agency charged with its enforcement. We respectfully submit that the approach of the District Court is that which this Court has adopted in performing the duty of applying the law

> "ad hoc, to an infinite variety of complicated industrial situations" *A. B. Kirschbaum* v. *Walling*, *supra*,

and that the Circuit Court of Appeals erred in its determination that the decision of this Court in the Muscoda case should control.

The Court has declared that the colloquial definition of "work or employment" utilized in the Muscoda case has

> "no necessary application to other states of facts" *Armour & Company* v. *Wantock*, *supra*.

In *Skidmore* v. *Swift & Co.*, *supra*, concerning waiting time, the Court declared

> "We have not, and cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

See, also, *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 572; *Walling* v. *A. H. Belo Corporation*, *supra*.

In approaching the difficult task of applying the Fair Labor Standards Act to the diverse situations confronting it, this Court has been fully conscious that a practical application of the general statutory language which is consonant with the purposes of the law is essential, and that the Court should avoid attempting to define legally those general terms which the Congress deemed it unwise to define.

The Court now has before it a factual situation which is completely different from that which was present in the Muscoda case. It must determine whether underground travel time constitutes a part of the work day in various coal mining occupations. A proper determination must rest upon the facts which prevail in the bituminous coal mining industry.

The employees involved in this case are within the scope of the Fair Labor Standards Act because Section 3(j) provides that

> "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining . . ."

Their employment in "mining" coal which moves in interstate commerce brings the employees herein within Section 7 of the statute.

The Court here is not faced with the problem of ascertaining whether the occupations in which these employees are employed constitute employment in "any occupation or process necessary to the production" of the coal within the meaning of the last clause of Section 3(j). The issue here is not whether the work performed bears such intimate relation to the production of goods for commerce as to bring the employees within the purview of that clause. Whether the underground travel of bituminous coal miners is "necessary" to the performance of the mining work which constitutes the consideration for which they receive their wages is not relevant to the question before the Court. The Court

must ascertain whether that travel is *part* of the work in the mining occupations in which they are employed and by reason of which they are entitled to the benefits of Section 7 of the Fair Labor Standards Act. That determination necessarily involves a scrutiny of industrial custom and usage and agreements. In an industry in which there exists a clear concept of what activity constitutes work, the determination cannot properly be made by resorting to the common dictionary definitions of "work" or "employment."

The Fair Labor Standards Act was enacted to eradicate specific economic evils and was intended for application to employees in the whole gamut of industrial pursuits. Therefore, the provision regarding maximum hours was couched in general terms. Where, as here, there is an established industrial concept of the "work day" which affords a practical measure of working time necessary for the economic welfare of employers and employees, the general language of a statute should not be held to compel the abolition of that concept in the absence of a clear legislative mandate or conflict with the purposes of the law. And the undisputed existence in the bituminous coal mining industry of a definitive concept of working time which excludes travel time is the primary factor which distinguishes this case from the iron ore mining situation presented to the Court in the Muscoda case. In the latter, the Trial Court found that no custom and usage existed at the time of the passage of the Fair Labor Standards Act which excluded travel time from work time; which finding this Court held was substantiated by the evidence. The finding was predicated upon the following factors:

1. Although existing arrangements provided for eight hours' work daily at the usual working place,

> "This provision carries little weight in establishment of a custom not to pay for travel time, since in practice

no record of the time spent 'at the usual working place' has been kept and it was the exception rather than the rule that a man worked precisely eight hours at such a place. The actual practice under those contracts was for the company to arrange a shift which was supposed to run, by way of example, from 6:45 A.M. to 3:15 P.M. at the usual stations of duty underground, with thirty minutes off for lunch. The men in the working stations closer to the underground man unloading stations would usually actually arrive at their working stations before 6:45 A.M. and start working earlier that 6:45 A.M., the men in the furthest working stations would frequently actually arrive later than 6:45 A.M. Quite generally most of the producing crews left their particular stations before 3:15 P.M. In all cases the men were credited with exactly eight hours work except in every unusual cases, although the time spent" at the usual working place" fluctuated thirty to forty-five minutes per shift as between men. Under these circumstances, regardless of the phraseology of the contracts, the pay was on a shift basis rather than an hourly basis, and since some of the men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in traveling to and from their usual stations." 40 F. Supp. 4, 7.

2.

"Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time." 40 F. Supp. 4, 8.

3.

"Even if the mode of payment of these men did clearly exclude such time as employment and workweek time, it could not provide a controlling construction of section 7 of the Act. The evidence clearly establishes that the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the

fact that they could not obtain terms that would compensate them for time spent in traveling underground to and from their working stations does not indicate that they did not consider that time as working time." 40 F. Supp. 4, 8.

In this case, the Trial Court has found that exactly the opposite conditions exist:

1.

"It does appear here, beyond any question, that travel time has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the 'face to face' basis has been universally recognized in the bituminous coal industry as the basis for computation of work time." 53 F. Supp. 935, 948.

2.

"Here, we have the word of both the operators and the union that as to the 'face to face' basis, 'this method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense.' " 53 F. Supp. 935, 948.

That no compensation was paid in the bituminous coal mining industry for any part of the time spent in traveling is acknowledged in the Houck letter, quoted by the Trial Court in this case, which states:

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898." (R. 670.)

As the Houck letter indicates, however, the necessity for underground traveling to reach places of work has been duly considered in fixing basic wage rates.

Referring to the above findings, the Circuit Court of Appeals remarked:

> "In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R.R. Co.* v. *Muscoda Local No. 23, etc.* U. S. , 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar."

Therefore, it is clear that the Circuit Court of Appeals fully accepted those findings.

Since there was no definitive concept of work time established in the iron ore mining industry at the time the Fair Labor Standards Act was enacted, the Court was compelled to invoke the colloquial definition and apply the term "work" in its broad and common sense.

In the bituminous coal-mining industry, more than forty years prior to the enactment of the Fair Labor Standards Act, employers and employees, prompted by the necessity for finding a practical solution to operating difficulties, adopted a definitive concept of work time. That concept, adhered to without deviation, had attained the status of

custom and usage in the industry when the Congress enacted the Fair Labor Standards Act.[1]

Paraphrasing the language of Mr. Justice Frankfurter's concurring opinion in the Muscoda case:

> Workweek, as applied to workers in the bituminous coal mining industry, had so settled a meaning at the time of the enactment of the Fair Labor Standards Act, as to be deemed incorporated by reference. As a result, "workweek" in this statute, as applied to workers in this industry and on this record, has a technical meaning—that is, a meaning so well known to those in the particular industry as to be applied by courts in enforcing the statute when invoked by men in the industry.

There is nothing in the history of the Fair Labor Standards Act, in its terms, or its purposes, which would indicate any legislative intention to disturb that fixed concept. For many years prior to the enactment of the Fair Labor Standards Act, the problems of the coal mining industry and the working conditions of the miners were the concern of the Congress and other Federal agencies, and the Congress was acutely conscious of the problems of this industry.

When it enacted the leasing Act of February 25, 1920, the Congress took a limited step with respect to the hours of work for underground miners, including coal miners, by establishing a "workday" not exceeding eight hours. Following the passage of that statute, the Secretary of the Interior, the coal mine operators, and the United Mine Workers continued to employ the face-to-face method of computing the "workday" in the bituminous coal mines.

---

[1]The Blackstone statement regarding the requisites of a valid custom, which was quoted by this Court in a footnote to the Muscoda decision, states: "it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." Commentaries, 77.

The Secretary of the Interior, who was charged with enforcing the limitation, never has challenged the validity of the face-to-face method in regard to coal mining operations subject to the Act of 1920.

When Congress enacted the Fair Labor Standards Act, it must be presumed to have been aware of the eight-hour provision contained in the Act of 1920; and by its silence during the eighteen years during which the Act of 1920 was being administered, it must be presumed to have acquiesced in the construction given to the eight-hour provision.

> "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 313.

In view of the similarity in the language employed in Section 30 of the Act of 1920 and in Section 7 of the Fair Labor Standards Act, it may reasonably be assumed that when it enacted the Fair Labor Standards Act, Congress did not intend to revoke the custom and usage in which it had tacitly acquiesced under the Act of 1920.

Further evidence that Congress did not intend to revise the established concept of the work day existing in the bituminous coal mining industry at the time the Fair Labor Standards Act was passed is contained in the Bituminous Coal Code of 1933. That code and subsequent modifications thereof were drawn up by the coal operators and the United Mine Workers pursuant to the National Industrial Recovery Act, which provided that industrial codes of fair competition made thereunder

> "shall contain the following provisions . . . (3) that employers shall comply with the maximum hours of labor, minimum rates of pay and other conditions of employment, approved or prescribed by the President." (§7(a))

As we have shown (Ante, P. 23) the Bituminous Coal Code, as amended in 1934, provided for a work day of "seven hours work at the usual working places." Thus, the NRA Code crystallized into law the face-to-face standard of measuring "maximum hours of labor"—the work day and the work week—giving legal sanction to usage and custom in the industry and to preexisting collective agreements.

Congress must be deemed to have been aware of the existence of the Bituminous Coal Code of 1933 and of its major provisions. The National Industrial Recovery Act was a legislative enactment designed to foster the promulgation of codes of fair competition which, as this Court said, were intended by the Congress to have the force and effect of miniature statutes for particular industries.

When Congress enacted the Fair Labor Standards Act, it was fully cognizant that for many years custom and usage in the bituminous coal mining industry had excluded travel time from the work day and work week. That concept of time worked had been contained in many collective-bargaining agreements between the coal operators and the powerful United Mine Workers of America. It had been deemed to comply with a federal statute fixing eight hours as the maximum work day for underground miners in coal mines (which statute was in force during many of the years when such agreements were made), and had been accepted as a proper provision for establishing "maximum hours of labor" under the National Industrial Recovery Act.

We submit that in the light of that background, unless the language of the statute or the intention and purposes of the Congress in enacting the Fair Labor Standards Act unequivocally demand it, Section 7 of the act should not be held to compel the inclusion of travel time in the work week of the bituminous coal miners.

The legislative history of the Fair Labor Standards Act (Ante P. 24) shows that except where necessary to eradicate substandard wages or intolerable hours of labor the Congress did not intend to interfere with the processes of collective bargaining.

Mr. John L. Lewis appeared for the United Mine Workers before the joint hearings conducted by the House Committee and the Senate Committee, and vigorously advocated that the agreements between the coal operators and the United Mine Workers be left unimpaired. And the committee reports and debates on the floors of both Houses show a continuing intention by the Congress not to impair the processes of collective bargaining.

The statute itself declares as its purpose the correction and elimination of

> "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well being of workers"

without

> "substantially curtailing employment or earning power" (§2)

Nowhere in the legislative history of the statute or in the language of the law itself is there any indication that the Congress intended the statute to abrogate well-established industrial concepts of what constitutes a work week in particular occupations or to compel an *increase* of earnings where not necessary to achieve the objectives of the act.

The statute leaves the term work week undefined. The definition of "employ"—to wit, that it includes to suffer or permit to work—sheds little light on the meaning of the term work week, since the term "work" also is a general term, susceptible of different meanings, and acquires definitive connotations from the environment in which it is used.

As the Circuit Court of Appeals said in the *Muscoda* case:

> "The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely 'because the employment relationships to which the Act would apply were so various and unpredictable.'" On Petition for Rehearing, 137 F. 2d 176, 183.

In applying the statute to the bituminous coal mining industry, the Court should not ignore the environmental characteristics which the terms "work," "workday," and "workweek," have acquired through many years of use and application in the industry.

Concededly, contracts made in violation of a statute are ineffective against the act, and custom and usage cannot prevail against a legislative mandate. Neither agreement nor custom and usage can exclude from the scope of the Fair Labor Standards Act that which the Congress intended to encompass within the terms "work" and "workweek." Those terms, however, are not words of art; and where, as here, through custom and usage and collective-bargaining agreements they have attained certainty of meaning in a particular industry, that meaning should not be revised by judicial construction where neither the language nor the purposes of the statute demand the revision.

In this connection, it is worthy of note that just three years prior to the Fair Labor Standards Act the Congress guaranteed the right of employees to bargain collectively in regard to hours of employment (National Labor Relations Act, Sec. 9). That the determination of hours of employment properly belongs in the realm of collective bargaining was reaffirmed in Sec. 7(b)(1) and (2) of the Fair Labor Standards Act, which provides that employees may be employed for hours in excess of forty per work week, without overtime, if the employment is pursuant to a collective-bargaining agreement guaranteeing and limiting the number of hours of employment in specified periods of time.

The National Labor Relations Act and Section 7(b)(1) and (2) of the Fair Labor Standards Act implicity recognize that when parties fix hours of employment, the agreement must be based on a mutual concept of the activity which constitutes work. Without it a meeting of the minds would be impossible. Therefore, there is nothing in Section 7(b)(1) and (2) which compels rejection of the concept

of work time which has been developed through collective bargaining in order to solve operating problems in the bituminous coal mining industry.

That the economic welfare of the miners impels the exclusion of travel time from the work week in the bituminous coal mining industry is made clear by the Houck letter (in which the coal-mine operators joined with the United Mine Workers) seeking from the Wage and Hour Administrator a ruling permitting maintenance of the custom under the Fair Labor Standards Act. That letter, signed by Mr. Earl Houck on behalf of the United Mine Workers, states:

> "It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within such mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated." (R. 670)

And it is of major significance that after a painstaking investigation the Wage and Hour Administrator ruled that the face-to-face method of computing work time in the bituminous coal mining industry would not be deemed a violation of Section 7 of the Fair Labor Standards Act.[1]

---

[1]The importance the Wage and Hour Administrator has attached to custom and usage and agreement in determining what constitutes time worked within the meaning of Section 7

To this date the ruling of the Wage and Hour Administrator in regard to the face-to-face method of computing work time has remained unchanged, although as the District Court pointed out:

"The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have

---

of the Fair Labor Standards Act is apparent from the following:

Interpretative Bulletin No. 13, originally issued July, 1939, and revised November, 1940, "Determination of Hours for which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," provides in part as follows:

> "Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The employee generally has a substantial amount of time for sleeping, eating, relaxation, etc. No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy." (1924 W. H. Man. 126)

and

> "In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he

> been aware, as his Regional Attorney was present in court throughout the trial and also attended the pre-trial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July 1940."

This Court has noted the importance of the Administrator's rulings as an aid to the Court in applying the Fair Labor Standards Act, stating that

> "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore* v. *Swift & Co., supra.*

> reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for the purpose of the Act." (1942 W. H. Man. 126)

Particularly pertinent is the release by the Department of Labor's Assistant Solicitor in Charge of Opinions explaining the difference between a fluctuating and regular work week. Interpretative Bulletin No. 4, "Maximum Hours and Overtime Compensation" lays down the Wage and Hour Division's ruling for computing the regular rate of pay of salaried employees to determine the overtime due them pursuant to Section 7 of the Fair Labor Standards Act, and states:

> "If the employee is on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the regular number of hours worked or if no regular number of hours is worked, by the total number of hours worked each week. If the employee works a regular number of hours, the regular hourly rate of pay will be a fixed rate, remaining unchanged from week to week. But if the employee works a fluctuating and not a regular number of hours, his regular hourly rate of pay will be the average hourly

The only reason for holding the travel time of bituminous coal miners to be part of the work week lies in the assumption that when Congress used the terms "work" and "workweek" it attached to them the colloquial dictionary meaning, to be applied inflexibly regardless of circumstances and results. Such an assumption applied to the facts of this case would ignore the long-existing concept of the work week in the bituminous coal industry, which concept has been accepted by employers, employees, and the administrative agencies of the Government charged with enforcing the Fair Labor Standards Act and the Act of February 25, 1920. It would read into the statute an intention on the part of the Congress to impose upon this

---

rate for the week and will vary from week to week." (1942 W.H. Man. 106)

In reference to an inquiry regarding the difference between a regular and a fluctuating work week, the Assistant Solicitor stated, in part:

> "In the record-keeping regulations we refer to a regular workweek established by 'agreement or custom.' By agreement we mean, of course, an understanding between employer and employee, either written or oral, which governs the number of hours the employee is expected to work in exchange for his salary. Where no such understanding exists, the number of hours the employee works in exchange for his salary may be fixed by custom and practice. Thus, if an employee works a certain number of hours week after week and variations from that number of hours occur on only infrequent and widely separated occasions, there is in all likelihood a regular workweek established by custom. In other words slight and occasional variations from the regular workweek will not modify the rule. Custom and practice may come into play in another way, however, that is, to modify a regular workweek set by agreement. Thus, if employer and employee agree to a certain number of hours in exchange for a salary but over a substantial period of time the employee customarily works a different number of hours or works a varying number from week to week, such custom and practice may serve to alter the agreement." (1942 W.H. Man. 132)

industry by silence a concept of work time completely different from that known to the Congress to be so well established as to constitute a custom and usage in the full legal sense. And it would inflict irreparable injury upon employers and employees alike.

It is recognized that the hourly wages paid to bituminous coal miners are higher than those paid to most workers in American industry. It is also recognized that their basic hours of work have been shorter than the hours of workers in practically all other major industries in America. (See Houck letter, R. 669) These favorable working conditions have resulted from years of collective bargaining; and the cornerstone of the wage and hour structure thus erected has been the agreement that work time should be measured on the face-to-face basis.

The impracticability of measuring working time in the bituminous coal mining industry by any other method is inherent in the very nature of coal-mining operations. When mines are first opened, the working places are close to the portal of the mine. However, as the coal mines are worked, the working places become farther and farther removed from the entrance to the mine. To include travel time from the portal of the mine to the usual working places as work time, therefore, would establish

> "such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated." (Houck letter, R. 670)

The older mines, with travel time running several hours a day, would be compelled to reduce wage scales in order to compete with those coal mines paying for less travel time. In individual mines wage rates would have to be adjusted to give consideration to the distance from the portal. In short, the added labor cost factor imposed in varying degrees upon each mine and as between mines, not only would make impossible the establishment of wage scales and hours

of work by collective agreement, but would create competitive conditions threatening the existence of many coal mines. In contravention of the expressed policy of the Fair Labor Standards Act, it would inevitably curtail employment and the earning power of many of the miners. (See §2, Fair Labor Standards Act).

Many bituminous coal mines are operated in states which have enacted laws defining the workday in mining. The face-to-face method of computing working time has been accepted as proper under those statutes. However, should travel time be declared to be work time by reason of the Fair Labor Standards Act, it is reasonable to assume that it would be ruled to be work time within the meaning of those statutes.

Such rulings would restrict the productive operations of some miners with substantial periods of travel time to approximately five hours per day. That curtailment of production, with other increased costs per ton because of the compulsory payment for travel time, would place some mines in a hopeless competitive position. The wages and earning power of employees in such mines would be drastically curtailed, and a substantial portion of the industry might be forced to cease operations.

This Court has taken judicial notice of the competitive conditions normally existing in the bituminous coal mining industry in peace times:

> "For a generation there have been various manifestations of incessant demand for Federal intervention in the coal industry. The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the Carter Case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty

among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395.

"The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." *Appalachian Coals* v. *United States*, 288 U. S. 344, 372.

A decision interpreting Section 7 of the Fair Labor Standards Act as compelling the inclusion of travel time in the work week would aggravate the very competitive conditions which this Court has deplored and which the Congress has acted to alleviate. The resultant operating difficulties and the substantial liability for back wages which would be imposed upon the coal operators would tend to create lower wages and unemployment.[1] The wage and hour standards

[1] In passing, it should be noted that such a decision also would require a revision of the Wage and Hour Administrator's regulations defining an employee engaged in an executive capacity for the purposes of applying the exemption contained in Sec 13 (a) (1) of the Fair Labor Standards Act. That regulation now enunciates several criteria for determining an employee's status. One criterion states an executive employee is one "whose hours of work of the same nature as

prevailing for employees in the bituminous coal mining industry thus would be lowered by a statute which was enacted to foster improved working conditions. The face-to-face method of computing work time has provided a satisfactory solution to a vexatious problem inherent in coal mining. Its abolition by judicial action would restore the problem and destroy the solution, without benefit to the employees.

The District Court properly noted that

> "The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators; there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry,

---

that performed by non-exempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment." (Reg., Part 541, §541.1) Many supervisory employees in coal mines now deemed within the executive exemption engage in the same amount of travel as the employees they supervise.. Where such travel time exceeds twenty per cent of the weekly hours of work, and in some mines it does, such supervisory employees would no longer qualify. *Executive status for such employees would depend upon the distance from the portal at which the work.*

but in situations not precisely covered by the language of the Act, its legislative history, as well as all the facts and circumstances, should be examined." 53 F. Supp. 935, 942 (R. 554).

Examination of the facts in this case compels the conclusion that the travel time of the miners is not made part of their work week by force of the Fair Labor Standards Act; and that the face-to-face method of computing work time complies with the requirements of the law.

This conclusion, which respects and preserves custom and usage and agreement in the industry, leaves the question of pay for travel time in the only area where it can reasonably and practically be resolved—namely, in the area of collective bargaining. We submit that in the light of all the relevant facts existing in the bituminous coal mining industry, it is the only conclusion which is consistent with the intention of Congress in passing the Fair Labor Standards Act.

Respectfully submitted,

EDWARD R. BURKE,
JOHN C. GALL

EDWARD R. BURKE,
515 Southern Building,
Washington 5, D. C.

JOHN C. GALL,
701 Southern Building,
Washington 5, D. C.

Counsel for Southern Coal Producers' Association.

February 12, 1945